



**COUNTY BOARD OF ADJUSTMENT**  
**YELLOWSTONE COUNTY, MONTANA**  
**Thursday, August 8, 2013**

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**SUBJECT:** Appeal of Zoning Coordinator approval – Fence Permit at 5545 Hennessy Road  
**THROUGH:** Candi Millar, AICP, Planning Director  
**PRESENTED BY:** Nicole Cromwell, AICP, Zoning Coordinator

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**REQUEST:** Appellants Lyle Seavy and Jeanine Holt-Seavy of 5560 Mystic Moon Lane have appealed the approval of a fence permit for adjoining property at 5545 Hennessy Road, owned by Mark and Lisa Cetrone. Mr. & Mrs. Cetrone purchased the property at 5545 Hennessy Road in October 2012. Mr. and Mrs. Cetrone previously operated a professional photography studio at 4028 Central Avenue. Mr. and Mrs. Cetrone are now semi-retired and they continue to take professional photographs as a home occupation at 5545 Hennessy Road. This is allowed as a home occupation in accordance with the Zoning regulations at Section 27-606. Mr. and Mrs. Cetrone desired a more private back yard and constructed a wooden fence along the property boundaries. The owner failed to obtain a fence permit prior to constructing the wooden fence. The neighboring property owners filed a complaint with County Code Enforcement concerning the fence constructed without a permit. Mr. and Mrs. Cetrone were notified by Mike Schieno, County Code Enforcement Officer, of the need to apply for a fence permit, the requirements for fence height, fence materials and the clear vision areas at street intersections and driveways.

Mr. and Mrs. Cetrone presented a completed fence permit application at the Planning Division front counter on June 21, 2013. The Zoning Coordinator, Nicole Cromwell, reviewed the application, the site plan, and the fence regulations with the applicant. The Zoning Coordinator approved the permit as presented and in compliance with the fence height regulations, the materials required, and the clear vision areas for the intersection of S 56<sup>th</sup> Street West and Hennessy Road, and where the driveway comes out to Hennessy Road. It was noted on the application the existence of a water ditch parallel to the fence along S 56<sup>th</sup> Street West and Hennessy Road. The ditch is regularly cleaned out and the spoils are piled along both ditch banks. The property owner previous to Mr. and Mrs. Cetrone placed 2-3 stacked railroad ties along the inside ditch bank to prevent the ditch spoils from piling into the yard. The fence company that installed the wooden fence placed the posts along the inside of the stacked railroad ties and placed the fence boards so they were at the same height as the top of the ditch bank as seen from the outside of the fence. If the boards were placed down to the grade below the ditch bank, the spoils and any water spilling out of the ditch would rot the bottom of the fence boards.

Placing fence boards at the same height of a ditch bank or on top of a retaining wall is a common practice throughout the zoning jurisdiction. There are several locations within the city limits where fences are built on top of retaining walls along Rimrock Road and Central Avenue. Pictures of these other locations are included for your information.

The receipt of an appeal stays all actions approved by the fence permit and any enforcement proceedings related to the property at issue. Pursuant to Section 27-1510, BMCC, the County Board of Adjustment must hear the appeal within a reasonable time, not to exceed 30 days. The appeal stays all proceedings of any action, which includes the code enforcement action. The Board may reverse or affirm, wholly or partly, or modify the order, requirement, decision or determination.

The appellants, Mr. and Mrs. Seavy, allege the Zoning Coordinator made an error approving the fence as constructed with the fence boards at the same height as the ditch bank along S 56<sup>th</sup> Street West. Mr. and Mrs. Seavy believe the fence exceeds the maximum height of 6 feet for fences. Mr. and Mrs. Seavy believe the fence height should be measured from the ground below the ditch bank and not from the top of the ditch bank. Mr. and Mrs. Seavy also allege the owners should have obtained a building permit since the fence is “over 6 feet” in height. If the property were located inside the city limits, a fence over 6 feet in height requires a City of Billings building permit. The City of Billings Building Division does not have jurisdiction outside the city limits. The State of Montana Building Codes Bureau has jurisdiction outside the city limits but does not issue permits for residential fences over 6 feet in height, or for any residential dwelling except for new plumbing, gas, or electrical services.

#### **STAFF INTERPRETATION**

The following are the relevant sections of the zoning code related to fences and height.

Section 27-200 defines fence, grade, height and structure as follows:

**FENCE:** *A barrier composed of posts connected by boards, rails, panels or wire for the purpose of enclosing space to separate parcels of land. This term also includes a masonry wall.*

**GRADE (ADJACENT GROUND ELEVATION):** *The lowest point of elevation of the finished surface of the ground, or the lowest point of elevation of the finished surface of the ground between the exterior wall of the building and the property line, if it is less than five (5) feet distance from the wall. In cases where walls are parallel to and within five (5) feet of a public sidewalk, alley or other public way, the grade shall be the elevation of the sidewalk, alley, or public way.*

**HEIGHT:** *The vertical distance from the highest point of a structure to the "grade", excluding permissible height exceptions in BMCC Section 27-310.*

**STRUCTURE:** *A building or anything constructed in the ground or anything erected which requires location on the ground or water, or is attached to something having location on or in the ground, but not including fences less than six (6) feet in height or paved areas.*

Section 27-604, the code section regarding fences, defines height as follows:

**HEIGHT:** *Height for the purposes of this section shall be defined as the vertical distance from the top rail, board or wire to the ground directly below.*

The proposed interpretation of the ground directly below is made by the reviewing staff at the time a permit is submitted. There are several instances where the difference between the top of the fence board and the ground “directly below” is a few inches over the maximum height due to natural variations in ground level and finished grade. Some properties have drainage swales that run through side yards and are narrow but to dip the fence boards down would not make sense or would require the fence to look uneven. In addition, if the swale is constructed to convey storm water, placing the fence boards down to the bottom of the swale would impede this water flow.

Similarly, if a property owner has a ditch bank and spoils area to contend with placing the fence posts and board into the ditch bank – while technically allowed by the fencing regulations – would damage the ditch bank and impede the normal maintenance of the ditch. The logical approach is to place the fence posts just outside the ditch bank and level the fence boards with the top of the ditch bank.

#### **RECOMMENDATION**

Staff recommends the Board of Adjustment affirm the Zoning Coordinator's determination the fence permit was approved in conformance with the regulations at 27-604 for fences.

#### **ATTACHMENTS**

- A. Letter of Appeal, Mr. and Mrs. Seavy received July 19, 2013
- B. Zoning map
- C. Photographs of site
- D. Photographs of similarly situated properties

**ATTACHMENT A**  
**Notice of Appeal**

Nicole Cromwell  
Zoning Coordinator  
510 North Broadway  
Billings Montana 59101



July 17, 2013

Dear Ms. Cromwell;

We respectfully request your review of this written appeal notice of a zoning compliance determination in relation to a fence built at 5545 Hennessy Road.

June 11, 2013 we called in a request for code enforcement review related to the fence being built at the above address by Lisa and Mark Cetrone. Our objection was the fence being constructed did not meet the height restriction in article 27-604 (b) and (c) of the Unified Zoning Code of Billings and Yellowstone County.

These regulations state that the height of the fence shall be measured from the top rail, board or wire to the ground below and the height prescribed is six feet. In the case of the fence in question the height from the top of the fence to the ground on the north side of the Cetrone lot ranges from 6 feet 2 inches to 6 feet 4 inches. The fence on the west side of the property on 56<sup>th</sup> street far exceeds the six foot standard and in some sections over 7 feet. The gap between the bottom of the fence boards and the ground can be seen in the enclosed pictures.

We understand that photographs from Cetrone's showing the fence from 56<sup>th</sup> street were used to explain the height adjustment for the retaining wall adjacent to the Glantz Water Users ditch. The rule (Sec. 27-604 (b)) states the fence height measurement is "to the ground directly below" which as you can see from the pictures is much more than six feet. Which according to Sec 27-604 (h) of the code states the fence should have been permitted by the building department (Ord. No 97-5048 5, 12-22-97: Ord. No04-5292 1,7-26-04), which was not obtained.

We had a telephone conversation on June 12, 2013 documented by an email on June 19, 2013 to Michael Schieno (see enclosed) during which we requested and onsite visit to address the concerns rather than relying on pictures supplied by either Mr. Schieno or the Cetrone's. We also requested at that time that an email from Ms. Cromwell to Mr. Schieno be forwarded to us to be available for an appeal. We never received the requested email and only received information about the appeal process from Mr. Schieno on June24, 2013. In that letter Mr. Scheino stated that



the fence permit was issued on June 21, 2013. We then called and requested a copy of the fence permit (enclosed) which was mailed to us on June 26, 2013. Clearly this permit was issued at least 10 days after the fence was erected.

The resolution we seek is for the Cetrone fence to follow code and not exceed 6 feet "from the top rail, board or wire to the ground directly below" [Sec. 27-604(b)].

We appreciate your review of this written appeal notice of a zoning compliance determination and look forward to the opportunity to discuss.

Respectfully,

Handwritten signatures of Lyle Seavy and Jeanine Holt-Seavy in purple ink.

Lyle Seavy and Jeanine Holt-Seavy

5560 Mystic Moon Lane

Billings Montana 59106

Enclosures;

Article 27-600 Supplementary General Provisions

Pictures

Email to Mike Schieno dated June 19, 2013

Fence Permit dated June 21, 2013

cc

County Board of Adjustments

510 North Broadway

Billings Montana 59101

ARTICLE 27-600. SUPPLEMENTARY GENERAL PROVISIONS

SEC. 27-604. FENCES, WALLS AND HEDGES.

(a) Fences, walls and hedges may be erected or maintained in any zoning district provided the height, setback, and material provisions outlined below are followed and a permit is secured. "Fence" for the purposes of this section means any fence wall or hedge. No fence shall be erected or maintained in a public right-of-way.

(b) *Height.* Height for the purposes of this section shall be defined as the vertical distance from the top rail, board or wire to the ground directly below.

(c) Setbacks required. Fences, walls or hedges of up to three (3) feet may be erected or maintained in the required front yard setback as defined in sections 27-308 or 27-309. Fences, walls or hedges between a height of three (3) and six (6) feet may be erected or maintained anywhere outside of the front yard setback, except as described in subsection (d) below. (see figure 6, section 27-618). Any fence, wall or hedge in excess of six (6) feet shall meet all of the yard setback requirements for structures as defined in sections 27-308 or 27-309. None of the above setback requirements shall apply to lands located in the agricultural-open space (A-1), central business district (CBD), controlled industrial (CI), or heavy industrial (HI) zones.

(d) Setbacks for clear vision zones. No fence, wall or hedge greater than three (3) feet in height may be erected or maintained in any zoning district within a clear vision zone pursuant to Section 27-615 and as illustrated in figures 1, 2, and 3 of section 27-618.

(e) Material permitted--residential and commercial zones. All fences in residential, agricultural and commercial zoning districts shall be constructed from materials which are commonly used for fencing and shall not be constructed from railroad ties, wood pallets, tires, rubble or salvaged material. Commonly used fence materials include wood, brick, stone, split railing, chain-link, wire, vinyl, ornamental iron work. Materials not listed are subject to special review.

(f) Material permitted--Industrial zones. All fences in industrial zoning districts shall be constructed from materials commonly used for fencing and shall not be constructed from railroad ties, wood pallets, rubble, or salvaged material. Commonly used fence materials include wood, brick, stone, split railing, chain-link, wire, vinyl, ornamental iron work, finished or coated steel or aluminum building panels. Materials not listed are subject to special review.

(g) Material exception--Barbed wire or electric fence. In the Billings City Limits, no barbed wire or electrical fencing shall be permitted in any residential zoning district. Barbed wire and electrically charged fencing is allowed in the A-1 and A-S districts within Yellowstone County. When electrically charged fences are used in an A-1 or A-S district, such fences shall be posted with warning signs or fluorescent markings at intervals not to exceed one hundred fifty (150) feet, where such fences are adjacent to public rights-of-way.

In the Billings City Limits, no electrical fencing shall be permitted in any commercial or industrial zoning district. Electrically charged fencing is allowed in commercial or industrial districts within Yellowstone County provided that such fences shall be posted with warning signs or fluorescent markings at intervals not to exceed one hundred and fifty (150) feet, where such fences are adjacent to public rights-of-way. Barbed wire fencing is allowed in commercial or industrial zoning districts both within the city limits and Yellowstone County when such material is located not less than eight (8) feet above grade.

**ARTICLE 27-600. SUPPLEMENTARY GENERAL PROVISIONS**

(h) Permit required. Any fence between a height of three (3) feet and six (6) feet shall require a permit from the planning department. Any retaining wall exceeding a height of four (4) feet or any fence exceeding a height of six (6) feet shall require a permit from the building department.  
(Ord. No. 97-5048, § 5, 12-22-97; Ord. No. 04-5292, § 1, 7-26-04)



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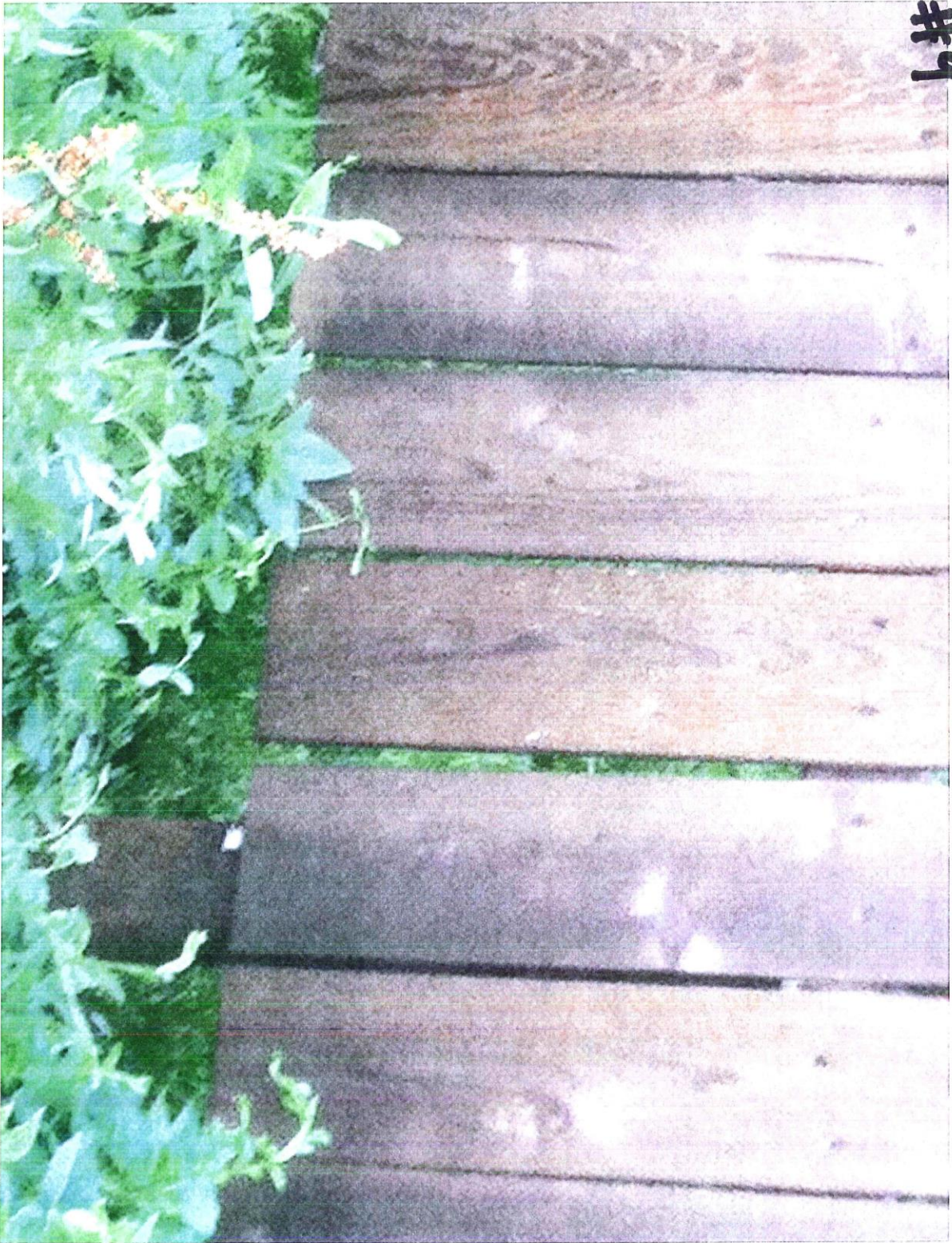




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**Jeanine Holt-Seavy**

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**From:** Jeanine Holt-Seavy  
**Sent:** Wednesday, June 19, 2013 10:34 PM  
**To:** 'mschieno@co.yellowstone.mt.gov'  
**Cc:** 'Seavy, Lyle'; Jeanine Holt-Seavy  
**Subject:** Code Enforcement ~ Mark & Lisa Cetrone 5545 Hennessy Road

Dear Mr. Schieno,

I am following up from our phone conversation last Wednesday June 12, 2013 . We requested additional review of code enforcement related to the newly built fence at 5545 Hennessy. We visited about a onsite review with Nicole as you indicated she had reviewed pictures and information you provided in making her ruling. We believe to adequately review for code enforcement of the fence it must be assessed on site.

Because you referred to an email from Nicole we had also requested a copy of said email and what the appeal process is if it become necessary for us to pursue such an avenue. We look forward to your contact in the near future as we have not had any follow up since our telephone conversation last week.

Thank you for your attention to this matter.

Lyle Seavy and Jeanine Holt-Seavy  
5560 Mystic Moon Lane  
Billings, Montana 59106  
406-672-5439



COPY



City of Billings and Yellowstone County

Zoning Jurisdiction Fence Permit

510 North Broadway, 4<sup>th</sup> Floor, Billings, MT 59101



*Easements and property lines are the responsibility of the property owner.*

BEFORE YOU DIG - CALL 1-800-424-5555

Date: 6-21-13

Permit#: PLN-13-02265

Property Address: 5545 Hennessey Road

Applicant Name: Mark & Lisa Cetrone Mailing Address: 5545 Hennessey Road

Phone: 670-7712 + 670-8422 E-mail: Lisa@cetronestudio.com +  
ml.86@rol.com

Agent Name: \_\_\_\_\_ Mailing Address: \_\_\_\_\_

Phone: \_\_\_\_\_ E-mail: \_\_\_\_\_

**Property Information:**

Replacement? No \*\*Replacement fences must meet current codes.

Fence Material: Cedar Retaining Wall? Yes No Partial

Zoning: R-150 Height 6ft + 4ft rail ties existing along 56th + Hennessey

Front Setback: \_\_\_\_\_ (feet) \*\*Fences over 4 feet are required to be behind the front setback in most zoning districts.

Clear Vision: \_\_\_\_\_

Corner lot? Yes/No If "Yes", is it a controlled intersection? Circle what applies:  
Traffic Signal Yield Stop sign

Clear Vision? Yes/No If "Yes", see the attached examples and circle those that apply:

(1a) Driveway & Alley	(1b) Central Business District Driveway & Alley	<u>(1c) Minor Street Stop</u>	(2b) All-Way Stop	(2c) Minor Street Yield
(2d) Traffic Signal	(2e) Central Business District Stop Sign or Traffic Signal	(3a) "Uncontrolled" Intersection	(3b) 2-Leg Uncontrolled Intersection	(3c) Uncontrolled, Permanent "T" Intersection

**OFFICE USE ONLY**

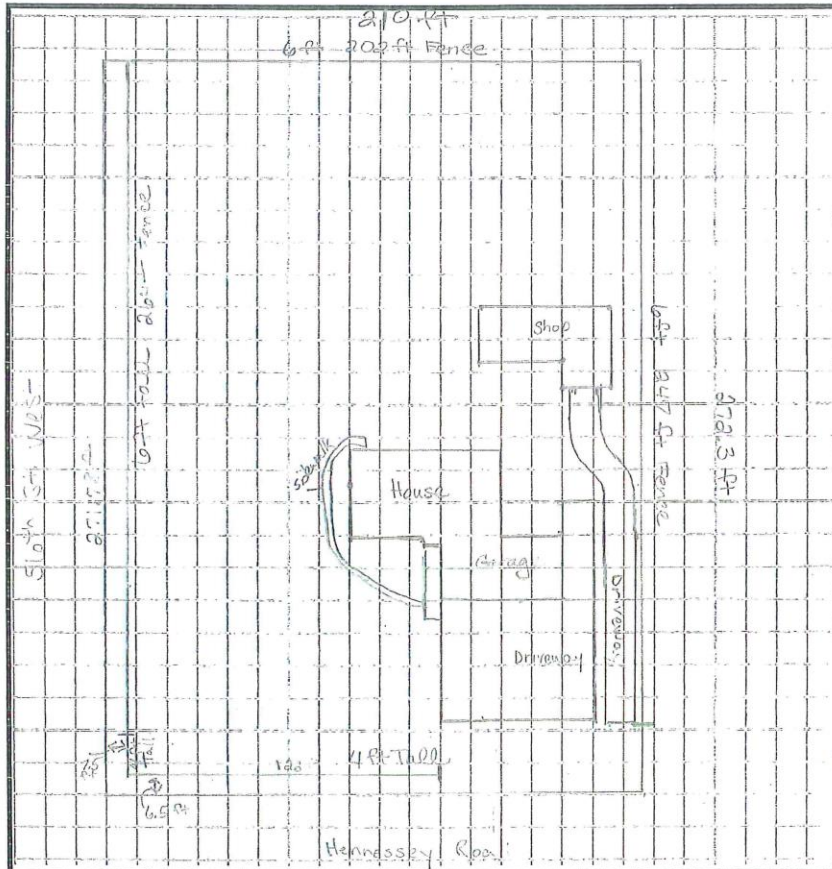
Fee: City-\$18.00/County \$17.00

Receipt #: PLN-13-02265

Site Visit Required? Yes/No Notify Code Enforcement? Yes/No

already done

1 square  
= 12 ft



By signing this permit, I agree to follow all applicable regulations governing location and size of fences on my property.

APPLICANT SIGNATURE: *Mike H*

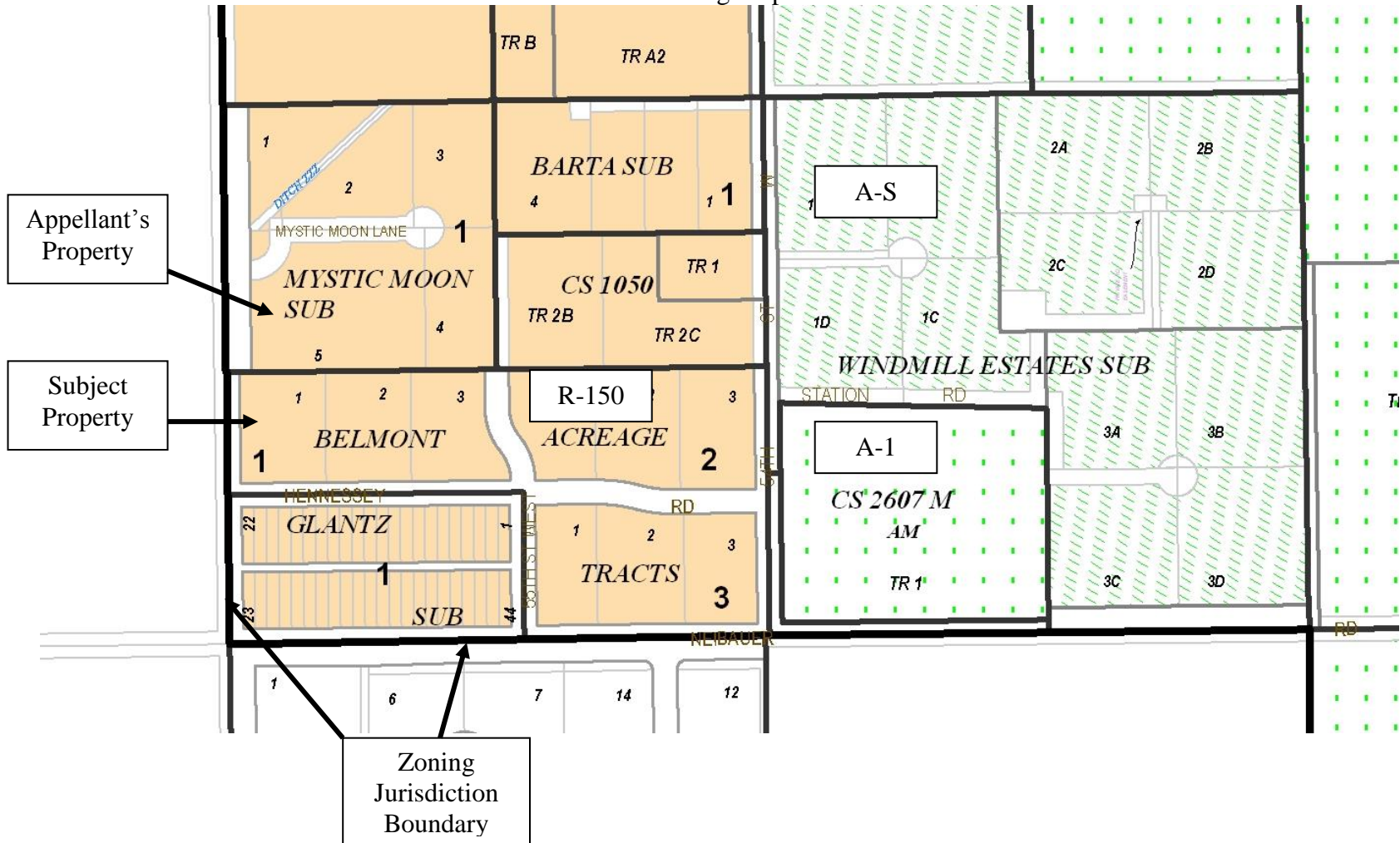
DATE: 6/21/2013

**PLANNING APPROVAL:**

DATE: 6/21/2013

# ATTACHMENT B

## Zoning Map





**ATTACHMENT C**  
Photos of Site



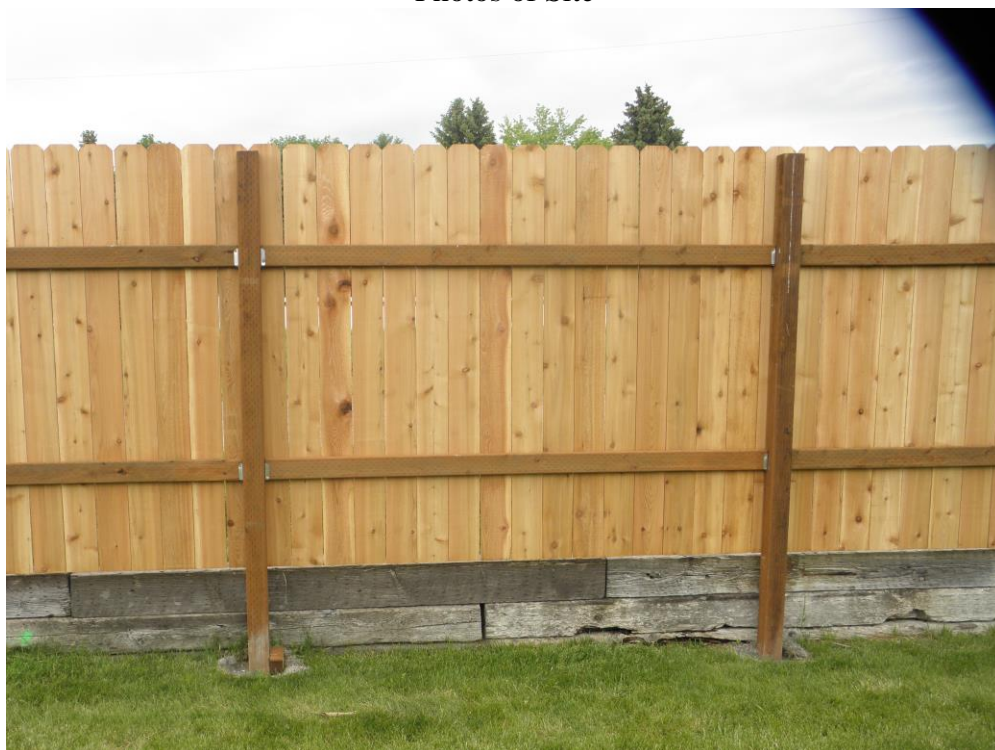
Subject Property in May 2003



Subject Property in 2011



**ATTACHMENT C, continued**  
Photos of Site



Subject Property in June 2013 – inside of fence along S 56<sup>th</sup> Street West



Measurement from top of fence to ground below railroad ties along S 56<sup>th</sup> St West ditch bank

**ATTACHMENT C, continued**  
Photos of Site



Fence along ditch bank at S 56<sup>th</sup> Street West looking north



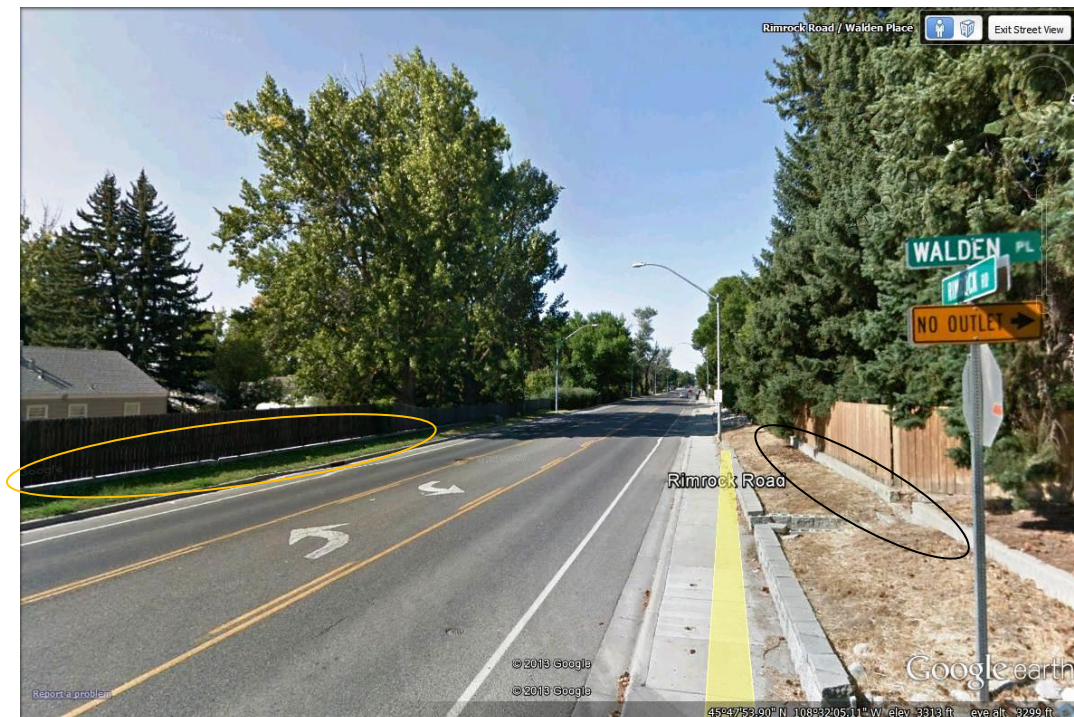
Fence along ditch bank on Hennessy Road – this fence has been cut down to 4 feet in height



**ATTACHMENT D**  
Photographs of similarly properties and fences



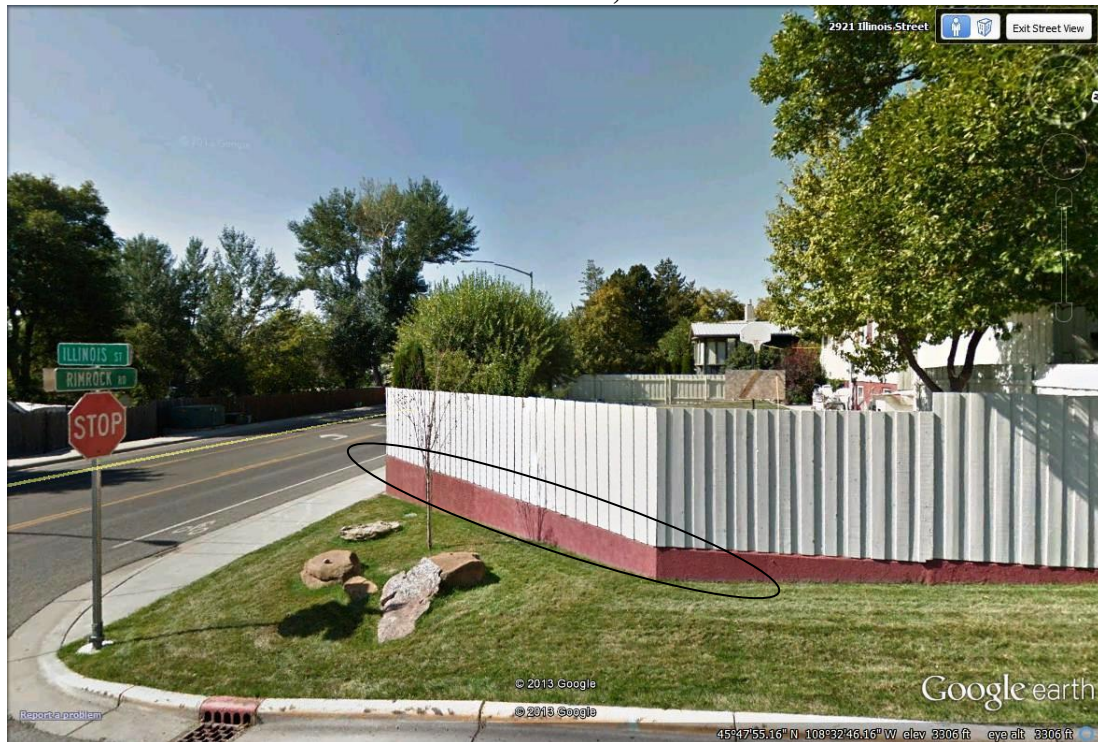
500 Block of Rimrock Road



Walden and Rimrock Road



**ATTACHMENT D, continued**



Illinois and Rimrock Road



Fence at King Avenue West and 36<sup>th</sup> Street West

**ATTACHMENT D, continued**



Fence at King Avenue West and 36<sup>th</sup> Street West



Fence at Poly Drive and Copper Boulevard



**ATTACHMENT D, continued**



Fence at Rimrock Road and Arvin Road